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No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER CORNELL JOHNSON

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REPLY BRIEF FOR PETITIONER CORNELL JOHNSON

Respondent effectively concedes the Ex Post Facto violation in this case. According to Respondent, "when the district court revoked petitioner's supervised release, it imposed a total restraint on petitioner's liberty (combined reimprisonment and supervised release) longer than the total duration of reimprisonment authorized under prior law." Gov't Br. 16-17. Respondent's sole argument in support of Mr. Johnson's sentence is thus that, "even before [section 3583(h)] was enacted, district courts had the authority under 18 U.S.C. [§] 35[8]3(e)(3) (1988 & Supp. IV 1992) to order offenders to serve a term of reimprisonment followed by a renewed term of supervised release." Gov't Br. 14. Respondent is incorrect about the power that the pre-amendment version of section 3583(e)(3) gave to district courts, and Mr. Johnson's sentence cannot stand.

I. The District Court Had No Authority, Prior to Enactment of Section 3583(h) in 1994, to Reimpose a Term of Supervised Release Following Imprisonment for One Whose Supervised Release Was Revoked.

In general terms, a law violates the prohibitions of the Ex Post Facto Clause if it is retrospective in application and it disadvantages the offender affected by the law by increasing the punishment for the crime. See *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997). Respondent does not challenge whether application of section 3583(h) in this case is retrospective. Gov't Br. 17. However, Respondent contends that application of section 3583(h) does not disadvantage Petitioner because "even before [section

3583(h)] was enacted, the district courts already had the authority, when revoking an offender's supervised release, to order the offender to serve a term of incarceration followed by a renewed period of supervised release, if the combined period was no greater than the original period of supervised release imposed on the offender." Gov't Br. 18.

Respondent's position is contrary to the text and history of section 3583(e)(3) and to the holdings of a majority of the circuit courts that have interpreted the statute. Only two of the circuit courts of appeals (the First and Eighth Circuits)[1] adopted Respondent's construction of the pre-1994 version of section 3583(e)(3). Nine others (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits)[2] rejected such an interpretation. The majority rule is the better reasoned.

A. The Text of the Statute Plainly Did Not Authorize Reimposition of Supervised Release.

The pre-1994 version of subsection (e)(3) was one of four mutually exclusive options available to the district

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[1] *See United States* v. *O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993); *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992).

[2] *See United States* v. *Koehler*, 973 F.2d 132, 134-36 (2d Cir. 1992); *United States* v. *Malesic*, 18 F.3d 205, 206 (3d Cir. 1994); *United States* v. *Cooper*, 962 F.2d 339, 341-42 (4th Cir. 1992); *United States* v. *Holmes*, 954 F.2d 270, 272-73 (5th Cir. 1992); *United States* v. *Truss*, 4 F.3d 437, 441 (6th Cir. 1993); *United States* v. *McGee*, 981 F.2d 271, 274-76 (7th Cir. 1992); *United States* v. *Behnezhad*, 907 F.2d 896, 898-99 (9th Cir. 1990); *United States* v. *Rockwell*, 984 F.2d 1112, 1116-17 (10th Cir. 1993); *United States* v. *Tatum*, 998 F.2d 893, 895-96 (11th Cir. 1993).

court for reviewing an offender's progress on supervised release. It was the *only* option in effect at the time of Petitioner's conviction to address a revocation of supervised release. Respondent argues that the plain text of subsection 3583(e)(3) provided district courts with the authority to reimpose supervised release. Respondent's argument requires a definition of the term "revoke" that is "strained and not faithful to ordinary legal usage." *United States* v. *Malesic*, 18 F.3d 205, 207 (3rd Cir. 1994) (vacating subsequent supervised release term imposed under the pre-1994 version of subsection (e)(3)).

The "starting point in every case involving construction of a statute is the language itself." *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Section 3583(e)(3) authorized the district court to "revoke" a term of supervised release.[3] "Revoke" plainly means "[t]o annul or make void by recalling or taking back. To cancel, rescind, repeal or reverse, as to revoke a license or will." See *Black's Law Dictionary* 1322 (6th ed.

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[3] Under the pre-1994 version of subsection (e)(3), the district court, after considering factors pertaining to imposition of sentence, could "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, . . . except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony[.]" 18 U.S.C. § 3583(e)(3) (1988 & Supp. IV 1992).

1990).[4] Thus, "[o]nce a term of supervised release has been revoked under § 3583(e)(3), there is nothing left to extend, modify, reduce or enlarge under § 3583(e)(2). The term of release no longer exists." *United States* v. *Holmes*, 954 F.2d 270, 272 (5th Cir. 1992).

If additional illumination of the meaning of "revoke" were required, it is found in the definition of "revocation." This definition demonstrates, without strain or extrapolation, that "revoke" represents the termination of supervised release and the imposition of a prison term. "In criminal law, [revocation] may refer to termination of a probation or parole order because of either a rule violation or a new offense, and forcing the offender to begin or continue serving his or her sentence." *Black's Law Dictionary* 1321 (6th ed. 1990). Thus, revocation of an order for non-detentive supervision terminates such supervision and results in commencement of a term of imprisonment.

A revocation under subsection (e)(3) logically results in the termination of supervised release and service of a term in prison. Imposition of a subsequent term of supervised release is thus a further action which, however much Respondent tries, cannot now be read into subsection (e)(3). The pre-1994 version of subsection (e)(3) (as well as the current version) defined the scope of the *prison term* that a district court could impose on an offender upon revocation of supervised release. Subsection (e)(3) provided, in relevant part: "a person whose

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[4] "Revoke" is also defined as "1. to annul by recalling or taking back: rescind. 2. to bring or call back," *Webster's Ninth New Collegiate Dictionary* 1010 (1991), or "withdraw, cancel," *The American Century Dictionary* 497 (1995).

term is revoked under this paragraph may not be required to serve more than 3 years *in prison* if the offense for which the person was convicted was a Class B felony, or more than 2 years *in prison* if the offense was a Class C or D felony[.]" 18 U.S.C. § 3583(e)(3) (1988 & Supp. IV 1992) (emphasis supplied). In placing such limits on the prison terms that may be imposed upon revocation, subsection (e)(3) made no mention of reimposing or reinstating the term of supervised release as a further sanction.

Congress's later enactment of subsection (h) expressly recognized that subsection (e)(3) dealt with imprisonment and thus defined the scope and limits of any new term of supervised release in a separate, new subsection. Subsection (h) states, in relevant part, that

> [w]hen a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release *after imprisonment*. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

18 U.S.C. § 3583(h) (1994) (emphasis supplied). According to the structure of the current statute and the omission of any reference to supervised release in subsection (e)(3), Congress never intended, now or earlier, that subsection (e)(3) would serve as the basis for reimposition of supervised release.

Respondent relies upon crabbed definitions of "revoke" and argues that the term means "to call back" or "to undo." Respondent thereby suggests that supervised release, once revoked under subsection (e)(3), may simply be reimposed. Gov't Br. 24; *United States* v. *O'Neil*, 11 F.3d 292, 295 (1st Cir. 1993) ("[I]f a term has been called back, it may be reimposed."). Nothing in the common definition of revoke contemplates such a reinstatement or reimposition. For example, a driver's license may be revoked upon a finding that the driver has committed a serious offense. See, *e.g.*, Tenn. Code Ann. § 55-50-501(a) (1998). A license once revoked results in the complete termination of the driving privilege, *id.*, and the license must be surrendered. See Tenn. Code Ann. § 55-50-503 (1998). To again receive driving privileges after revocation, the driver usually must reapply for a new license and comply with initial licensing procedures. See Tenn. Code Ann. § 55-50-502(f)(3) (1999 Supp.). On the other hand, a driver's license may be suspended, rather than revoked, for less serious traffic infractions. See Tenn. Code Ann § 55-50-502(a) (1999 Supp.). Upon satisfying certain conditions to lift the suspension, the driver's privilege to drive may be reinstated without the need to reapply for a license. See Tenn. Code Ann. § 55-50-502(f)(1) (1999 Supp.). Respondent thus contends, in effect, that "revoke" in subsection (e)(3) should be construed as if it were "suspend." Such a tortured construction, which flies in the face of ordinary legal usage, should be rejected.

Respondent similarly strains the definitions for words and phrases used in subsection (e)(3), such as "the term," " 'serve in prison' all or part of the term of supervised release" and "credit for time previously served on

postrelease supervision." Gov't Br. 25-26 (quoting 18 U.S.C. § 3853(e)(3) (1988 & Supp. IV. 1992)). However, these words and phrases in subsection (e)(3) serve only as limitations upon the subsequent prison term to be imposed following revocation. They cannot reasonably be read to permit a district court also to impose an additional form of punishment (other than a prison term) merely because there is reference in the subsection to the *original* term of supervised release. Congress certainly intended that the district court would have the authority to send a non-compliant offender back to prison upon revoking the offender's order for supervised release, and that a term in prison would be ordered without reducing it for time spent successfully on supervised release. To read more into subsection (e)(3), however, places a burden on the language of the statute that it cannot carry.

Respondent's argument also fails to explain why Congress saw fit to enact a separate subsection (h) rather than merely clarify the actual authority granted in subsection (e)(3). Subsection (h) explicitly authorized, for the first time, the reimposition of supervised release following incarceration for revocation. In introducing the Probation and Supervised Release Revocation Act of 1993, which included proposal of subsection (h), Senator Thurmond, the bill's sponsor, advised the Senate that "[t]here is widespread and growing confusion in the Federal Courts regarding what sanctions a court may impose when it revokes an offender's term of probation, or supervised release, because the court finds that the offender has violated probation or supervised release

conditions." See 139 Cong. Rec. S2090-02, at 2150 (daily ed. Feb. 25, 1993) (statement of Sen. Thurmond, sponsor). Regarding the reimposition of supervised release, Senator Thurmond stated that

> [t]he bill *authorizes* reimposition of a term of supervised release upon revocation. The third critical provision of the bill – substantively identical to section 2504 of the crime bill conference report – *expressly authorizes* the court to order an additional, limited period of supervision following revocation of supervised release and reimprisonment.

Id. at 2151 (emphasis supplied).

Congress did not authorize district courts to add a new post-reimprisonment supervised release term merely by tinkering with the language of the pre-1994 version of subsection (e)(3), as if to make a pre-existing sentencing power more apparent. Rather, Congress created an altogether new power by adding a new subsection. Had Congress intended to alter, and thereby clarify, the terms of subsection (e)(3), it would have done so in the body of that subsection. But Congress did not add this new power to subsection (e)(3). In fact, when Congress added subsection (h), it also modified *unrelated* terms in subsection (e)(3).[5] These unrelated changes strongly reinforce the conclusion that Congress never intended to authorize the

[5] The amendments to subsection (e)(3) included striking "person" and inserting "defendant," and amending paragraph (e)(3) to add a cap of 5 years on the term of reimprisonment for class A felonies. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(2), 108 Stat. 1796, 2016.

reimposition of supervised release under the pre-1994 version of section 3583(e)(3).

Finally, the 1994 enactment did not contain any evidence that Congress intended the amendment to apply retroactively to conduct that arose before its passage. Had Congress been clarifying the district court's powers under subsection (e)(3), the legislative record likely would contain extended discussion of retroactive application of the clarified subsection. But no such discussion appears. Absent clear evidence, the provisions of the newly enacted statute may not be applied retrospectively, due to the presumption against statutory retroactivity. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 304-09 (1994).[6]

B. The Purpose of Section 3583(e)(3) Demonstrates the District Court's Authority to Impose a Term in Prison, but Not to Reimpose Supervised Release, upon Revocation.

Supervised release was created by Congress and introduced into the federal criminal justice system in the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1999. The Sentencing Reform Act authorizes a district court to impose, as part of a

[6] Respondent concedes that, if the Court determines that section (e)(3) does not provide the authority to reimpose supervised release, "the sanction imposed on petitioner for violation of his supervised release in this case must be vacated and the case remanded, because the district court relied on Section 3583(h) to impose a sanction on petitioner that is not within the standard of punishment to which he could have been exposed under prior law." Gov't Br. 35.

sentence, a term of supervised release following a term of imprisonment. See 18 U.S.C. § 3583(a). The "primary goal" of such a term of supervised release is " 'to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.' " Gov't Br. 3-4, (quoting S. Rep. No. 98-225, at 124 (1983)); *id.* at 26-31. However, Respondent is incorrect in assuming that, upon revocation pursuant to section 3583(e)(3), the same purpose is being served.

Section 3583(e)(3) provides the district court with the specific authority to "treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of [Title 18] and to carry out the appropriate contempt proceedings and sanctions as specified in 18 U.S.C. [§] 401." S. Rep. No. 98-225 at 125 (1983). The Senate Judiciary Committee noted that "[i]t is intended that contempt of court proceedings will only be used after repeated or serious violation of the conditions of supervised release." *Id.* The Committee also explained that,

> [i]n past Congresses, the legislative history of the sentencing reform proposal has contemplated use of criminal contempt as a sanction for violation of conditions of post-release supervision. The Probation Committee of the Judicial Conference urged the Committee to expressly state the availability of this sanction in the legislation to avoid confusion, and the Committee has done so.

Id.

As referenced in the Committee Report, 18 U.S.C. § 401 grants the district court the power to "punish by fine or imprisonment, at its discretion, such contempt of its authority" as "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3).[7] Thus, the goal, authority and punishment underlying section 3583(e)(3) differ substantially from that pertaining to the imposition of supervised release at initial sentencing. Consequently, Respondent has incorrectly assessed the basic purpose underlying section 3583(e)(3), and ignored that subsection (e)(3) was provided to punish an offender for contempt of court. Moreover, although section 401 permits the district court to exercise wide discretion in punishing an offender's contempt, and although subsection (e)(3) permits the court to exercise discretion in modifying supervised release terms, no exercise of discretion is permitted under (e)(3) except with respect to the offender's subsequent prison term.

C. The Background of the Supervised Release Statute Demonstrates That Congress Initially Intended to Limit the Scope of the Penalties for Supervised Release Revocation.

Respondent argues that the probation, parole, and special parole practices that predated the creation of

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[7] Section 401 also empowers the court to punish "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" and "[m]isbehavior of any of its officers in their official transactions." 18 U.S.C. § 401(1), (2).

supervised release provide support for its construction of the pre-1994 version of subsection (e)(3). Gov't Br. 32-35. In so arguing, Respondent essentially adopts the reasoning set forth by the First Circuit in *United States* v. *O'Neil*, 11 F.3d 292, 298-300 (1st Cir. 1993). But Respondent ignores the impact that the Sentencing Reform Act of 1984 had on probation, parole, and special parole. The Sentencing Reform Act of 1984 represents a "sharp and considered break with the past, rejecting the 'medical model' of penology. This is also true with respect to post-incarceration remedies." *United States* v. *Malesic*, 18 F.3d 205, 207 (3d Cir. 1994). Given this sharp break with the past, Respondent's attempt to draw support from abandoned practices is dubious at best.

For example, Respondent observes that a "similar question arose under the old probation statute" and that a "majority of courts concluded that a new term of probation was a 'sentence' that might be imposed after the court's revocation of the initial term of probation." Gov't Br. 32, citing 18 U.S.C § 3653 (1982). But Respondent ignores the simple fact that Congress has since amended the "old" statute. In 1988, Congress enacted a version of the probation statute that empowered a district court to revoke the sentence of probation and impose "any other sentence" that was available at the time of the initial sentencing. 18 U.S.C. § 3565(a) (1988). Although the question was not before the court, the First Circuit in *O'Neil* acknowledged this "new" sentencing regime (*i.e.*, after supervised release was created, but before section 3583(h) was added), stating that

> it seems probable that Congress intended to depart from prevailing pre-guidelines practice and forbid reimposition of probation following the revocation of a term of probation. We draw this inference from the insertion of the word "other," on the theory that a change in statutory language should be "read, if possible, to have some effect."

11 F.3d at 299 (quoting *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992)).[8] In short, when one refers to the more recent probation statute, Respondent's argument fails.

Petitioner agrees with the First Circuit's assessment of Congress' intent in changing the probation revocation statute.[9] In any event, if any lesson can be drawn from the probation revocation statute, it is only that, before the enactment of subsection (h), when a defendant who violated his or her supervised release was reimprisoned, there was no warrant for the district court to impose an additional supervised release term. Just as Congress sharply limited the district court's discretionary authority following probation revocation, it also sharply limited the

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[8] The *O'Neil* court opined that, "[e]ven if Congress intended to preclude reimposition of probation following revocation of a term of probation, that intention has no implications for supervised release." 11 F.3d at 299 n. 7. "Under the Sentencing Reform Act, a term of probation may not be imposed when a defendant is sentenced to imprisonment. [Statutory citation omitted] Since a 'combined' sentence is prohibited *ab initio*, it would make little sense to allow a combined form of sentencing upon revocation of probation." *Id.*

[9] Congress has again amended the probation revocation statute. It currently empowers a court to "revoke the sentence of probation and resentence the defendant under subchapter A." 18 U.S.C. § 3565(a)(2) (1994). Subchapter A refers to the general sentencing provisions of 18 U.S.C. §§ 3551 *et seq.*

district court's discretionary authority following supervised release revocation.

Respondent also claims that the practice under parole and special parole supports its contention that reimposition of supervised release was authorized under the pre-1994 version of section 3583(e)(3). Special parole, which is governed by 21 U.S.C. § 841, was an additional penalty for all drug offenses and was mandatory in all cases until the Sentencing Reform Act of 1984 replaced it with supervised release.[10] Special parole, somewhat like supervised release, was part of the criminal sentence which a defendant in a narcotics case was required to serve after completing a prison term. The old special parole statute included wording similar to that of section 3583(e)(3):

> A special parole term . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section . . . shall be in addition to, and not in lieu of, any other parole provided for by law.

21 U.S.C. § 841(c) (repealed 1984). Thus, if a person on special parole violates the terms of his supervision, 21

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[10] Special parole still applies to drug crimes committed before November 1, 1987.

U.S.C. § 841(c) allows the United States Parole Commission to reincarcerate him for all or part of his original "special parole term," without allowing him credit on his jail time for his "street time." The statute is altogether silent on whether the Parole Commission may impose another term of *special* parole upon a prisoner who is reincarcerated for only a part of the original special parole term.

Just as there was disagreement among the circuit courts of appeals as to the authority conferred on district courts by the pre-1994 version of section 3583(e)(3), there is disagreement as to the application of the special parole provision.[11] The majority of the circuit courts of appeals have determined that the special parole statute does not authorize the reimposition of special parole following revocation and incarceration. In fact, many of these courts expressly rely upon similar holdings in subsection (e)(3) cases for precisely the reason that subsection (e)(3),

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[11] Compare *Billis* v. *United States*, 83 F.3d 209, 211 (8th Cir. 1996) (Parole Commission has authority to re-release on special parole), and *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 823-24 (D.C. Cir. 1995) (same), with *Dolfi* v. *Pontesso*, 156 F.3d 696 (6th Cir. 1998) (Parole Commission does not have authority to reimpose special parole); *Whitney* v. *Booker*, 147 F.3d 1280 (10th Cir. 1998) (same); *Robles* v. *United States*, 146 F.3d 1098 (9th Cir. 1998) (same); *Strong* v. *United States Parole Comm'n*, 141 F.3d 429 (2d Cir. 1998); *United States v. Robinson*, 106 F.3d 610, 611-13 (4th Cir. 1997) (same); *Fowler v. United States Parole Comm'n*, 94 F.3d 835, 840-41 (3d Cir. 1996) (same); *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 264-65 (7th Cir. 1996) (same); *Artuso* v. *Hall*, 74 F.3d 68, 71-72 (5th Cir. 1996) (same); and *Manso* v. *Federal Detention Ctr.*, 182 F.3d 814 (11th Cir. 1999) (same).

like 21 U.S.C. § 841(c), simply does not provide for reimposition of supervised release.[12]

II. If the Court Determines That the Statute Is Ambiguous, the Rule of Lenity Requires a Finding That Subsection (e)(3) Did Not Authorize Reimposition of Supervised Release

Criminal statutes are to be strictly construed, see *Dowling* v. *United States*, 473 U.S. 207, 213 (1985), and the words used are to be given their "ordinary meaning." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). We presume that "a legislature says in a statute what it means and means . . . what it says." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Further, when the words of a statute are unambiguous, its plain language controls and judicial inquiry is complete, except in "rare and exceptional circumstances" that do not exist here. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

Petitioner has demonstrated that the plain language of the pre-1994 version of 18 U.S.C. § 3583(e)(3) cannot reasonably be construed to permit a further supervised release term. However, in the event that the Court finds genuine ambiguity in 18 U.S.C. § 3583(e), application of the rule of lenity is appropriate. See *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). Importantly, Petitioner is not relying upon

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[12] *See, e.g., Dolfi*, 156 F.3d at 699 (relying on *United States* v. *Truss*, 4 F.3d 437 (6th Cir. 1993)); *Artuso*, 74 F.3d at 71-72 (relying on *United States* v. *Holmes*, 954 F.2d 270 (5th Cir. 1992)).

"[t]he mere possibility of articulating a narrower construction" of section 3583(e). *Smith* v. *United States*, 508 U.S. 223, 239 (1993). A sizable majority of the circuits have articulated the same construction Petitioner suggests.

Under the rule of lenity, a court must not "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958). The rule of lenity applies not only to substantive criminal statutes, but to sentencing provisions as well. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980).

At least one court of appeals has relied on the rule of lenity in construing subsection 3583(e)(3). The Second Circuit in *United States* v. *Koehler*, 973 F.2d 132, 134-35 (2d Cir. 1992), surmised that the language of subsection (e)(3) precludes the combination of sentencing options that were imposed upon Petitioner. "Revocation of the original term of supervised release and imposition of a prison term under subdivision (3) of § 3583(e) is linguistically inconsistent with extension or modification of that [supervised release] term under subdivision (2)." *Id.* In *Koehler*, the court concluded that "[a]n interpretation of § 3583 that allowed a term of imprisonment pursuant to subdivision (3) to be followed by a fresh term of supervised release pursuant to subdivision (2) would increase the penalty imposed upon Koehler without any clear

statutory basis for doing so, counter to the rule of lenity." *Id.* at 135.[13]

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[13] Respondent's brief addresses a number of matters that have no application to this case. For example, although Respondent questions at length whether the Ex Post Facto Clause is implicated where the minimum sanction authorized by the prior law is not affected by a change in the law and points out that this Court has not addressed such a situation, Gov't Br. 36-42, Respondent concedes that "[i]f the sole issue is whether the standard of punishment increased, Section 3583(h) would be considered an ex post facto law in all applications to pre-enactment offenders." *Id.* at 36. Similarly, Respondent questions whether the Ex Post Facto Clause is implicated where the legislature has only increased the maximum sentence authorized for an offense where the defendant was sentenced within the range authorized by prior law, Gov't Br. 36-42. Ultimately, Respondent concedes that "[t]his case, however, does not present an occasion for the Court to consider the possibility that the mere increase in a statutory maximum sentence does not violate the Ex Post Facto Clause as applied to a defendant sentenced within the range authorized under prior law." Gov't Br. 42-43. Petitioner expresses no view on these collateral matters.

CONCLUSION

For these reasons, and for the reasons stated in petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

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